



Chapter Seven

ENCROACHMENTS

MONTANA RIGHT-OF-WAY
OPERATIONS MANUAL

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Chapter Seven

ENCROACHMENTS

7-1 ENCROACHMENT POLICY

7-1.1 General

Real property that is within the right-of-way boundaries of Montana highways is intended to be devoted to public highway purposes. Right-of-way includes the property rights necessary to meet the needs of construction, operation and maintenance of the highway. The Montana Department of Transportation (MDT) is responsible for preserving the right-of-way free of public and private installations or facilities that are not a part of the highway facility and are not consistent with its safe operation, maintenance and use.

The purpose of this encroachment policy is to ensure safe conditions on the highway facility, to allow for efficient and effective maintenance, and to protect the public investment in the original cost of the right-of-way and of the highway facility.

Upon proper review and authorization, as further described in this Chapter, certain encroachments may be permitted to remain on the right-of-way. These must be under agreement with the Department and are subject to removal if they subsequently interfere with the safe operation and maintenance of the highway.

7-1.2 Encroachment Definition

An encroachment is any installation, device, object or occupancy that is located at, above or below the grade line of the highway and within the right-of-way limits, and that is not installed as part of the highway facility by MDT.

Encroachments include, but are not limited to the following within the right-of-way:

- overhanging projections of signs, where the base is installed off the right-of-way;
- fences, walls and gates;
- abandoned vehicles and equipment;
- trails or pathways for use by off-road vehicles (e.g., ATV's, snowmobiles);
- advertising devices, including political banners;
- buildings or structures;
- projections from buildings (e.g., stoops, decks, porches);

- tree plantings or landscaping;
- grazing livestock;
- approaches in violation of MDT Access Control Policy;
- excavations or fill material; and
- private signs, emblems, symbols, posters, monuments, etc.

The following installations are not encroachments:

- utility facilities that were installed pursuant to Montana's Utility Accommodation Policy;
- private approaches that were installed in compliance with Montana's Access Management Policy; and
- private temporary public service facilities in rest areas that have been authorized by the MDT Traffic Engineering Section or the Maintenance Division.

MDT reserves the authority to remove any public or private installation on the public right-of-way without notice if it presents a hazard to public safety, or interferes with traffic operations.

7-1.3 Legal Authority

In establishing and enforcing its encroachment policy, MDT acts in conformity with the legal authorities summarized below. The full text of legislative enactments and regulations should be read for a complete understanding of the provisions. These legal authorities include:

1. **MCA Section 60-3-101, Legislative Assent to Federal-Aid Act.** MDT is authorized to enter into contracts and agreements with the United States and to make rules relating to the construction, reconstruction, repair and maintenance of highways in the State.
2. **MCA Section 60-6-101, Highway Encroachments – Removal.** If any highway under jurisdiction of the Transportation Commission is encroached upon by a fence, building, structure, sign marker or other obstruction, MDT may give notice in writing to the person erecting or maintaining the encroachment, requiring it to be removed.

If the encroachment obstructs and prevents the use of the highway for vehicles, MDT may immediately remove it without notice.

3. **MCA 60-6-102, Notice of Encroachment.** This provision establishes the content and manner of providing notice of encroachment. Notice must specify the width of the highway right-of-way and the place and extent of encroachment. Notice must be provided in writing and delivered by certified mail or personal service to the business or residence. If an address for delivery cannot be found, the notice is posted on the encroachment.
4. **MCA 60-6-103, Time Limit for Removal.** If the encroachment is not permanently affixed to the land, it must be removed from the right-of-way within 2 days after receipt of the notice. If the encroachment remains after this period, the person who causes, owns or controls the encroachment is liable for the cost of removal.
5. **MCA 60-6-104, Denial of Encroachment.** If the existence of the encroachment is denied, the Department may commence appropriate legal action to have the encroachment removed. If the Department recovers judgment, it is entitled to recover its costs. If the encroachment is not removed within 5 days after entry of judgment, the Department may remove it at the expense of the person who causes, owns or controls it.

If the encroachment affixed to the land is not denied or is not removed within 5 days after receipt of the notice, the Department may remove it at the expense of the person who causes, owns or controls it.
6. **23 CFR 1.23(b), Use for Highway Purposes.** All real property, including air space, that is within the right-of-way boundaries of a project must be devoted exclusively to public highway purposes. Exceptions are permitted for informational sites and for uses defined in 23 **CFR** 1.23(c); Item #7. below.
7. **23 CFR 1.23(c), Other Use or Occupancy.** Temporary or permanent occupancy or use of right-of-way for non-highway purposes, or reservation of subsurface mineral rights, may be approved if it is determined that it is in the public interest and that it will not impair the highway or interfere with the free and safe flow of traffic.

7-1.4 Encroachment Classification

The following encroachment categories apply in the application of the MDT encroachment policy to non-controlled access highways. Encroachments on controlled access highways are processed in accordance with Section 7-2.

7-1.4.1 Class A – Encroachments Subject to Municipal Exception

The following facilities and devices may encroach the right-of-way within the jurisdiction of municipalities or other local units of government under the conditions specified below:

- private advertising signs, eaves, marquees and similar devices that overhang the right-of-way;
- private underground facilities (e.g., vaults, access and transportation tunnels, sidewalks, freight entrances);
- grass, trees, shrubs and other landscaping adjacent to sidewalks and curbs that have been placed and maintained by abutting property owners; and
- limited private commercial use, including display of merchandise, sidewalk cafes, vehicles, machinery and store goods.

The encroaching facility, device or occupancy must meet the following conditions and criteria:

1. The use (facility, device or occupancy) complies with local government ordinances or regulations allowing such use. Or, with regard only to private underground facilities, the facility currently is under agreement with the local government.
2. The use does not conflict or interfere with traffic control signs, signals or other official traffic control devices.
3. The use does not interfere with traffic, operation or maintenance of the highway, or impede the public use of the right-of-way.
4. The location of an overhanging device (e.g., private advertising signs, eaves, marquees) with respect to the highway complies with criteria that have been established by the MDT Right-of-Way Bureau Chief.
5. The use complies with applicable safety criteria adopted by the American Association of State Highway and Transportation Officials (AASHTO).

7-1.4.2 Class B — Encroachments Subject to Air Space Agreement

Encroachments that comply with, or that can be adjusted to comply with, MDT right-of-way airspace criteria may be considered for continued occupancy pursuant to a Right-of-Way Airspace Agreement. See Chapter 6 for airspace use criteria.

7-1.4.3 Class C — Encroachments Subject to Conditional Agreement

Encroachments that cannot be adjusted to meet airspace use criteria, but that do not require immediate removal for reasons of safety, traffic operations or maintenance, may be considered for continuance under conditional agreement. This status requires the user to acknowledge the jurisdiction of MDT, the required ultimate removal of the use or occupancy, and the obligation to perform any adjustments required by MDT.

Conditional agreements are intended to accommodate owners of encroachments that are unintentional and minimally intrusive. This includes corners of buildings, garages, porches and stoops, fences, etc.

7-1.4.4 Class D — Encroachments Affecting Safety, Traffic or Maintenance

All encroachments that interfere with safety, traffic operations or maintenance will be removed. The manner of notification and removal is discussed in Section 7-3.

7-1.5 Inventory of Encroachments and Encroachment Reports

On receipt of information of a proposed new construction project or a maintenance section on which encroachments must be removed or controlled, the Real Estate Services Section Property Manager requests that the District Construction Section Supervisor prepare an Inventory of Encroachments (Form RWE-2) for the project. The property manager also requests Individual Encroachment Summary Reports (Form RWE-1).

7-1.6 Responsibilities of MDT Units

Following are MDT organizational units that may be involved in the control of encroachments and their primary role in the process:

- Right-of-Way Bureau Policy, coordination and owner contact
- Maintenance Division Continuing surveillance and jurisdiction
- Preconstruction Bureau Review for removal or adjustment
- Construction Bureau Classification
- Legal Services Enforcement

The roles and responsibilities of each unit are discussed in later Sections of this Chapter.

7-2 ENCROACHMENT CONTROL

7-2.1 Encroachments on Full-Access Control Highways

No private use of State highway systems right-of-way is allowed within or between the access control limits of a full-access control highway, except as provided below:

1. The Director of MDT or his or her authorized representative may approve individual private encroachments within the controlled access right-of-way. Concurrence of the Federal Highway Administration (FHWA) must be secured for encroachments on the Interstate Highway System.
2. Encroachments within controlled access right-of-way must conform to criteria set forth governing the occupancy of State right-of-way by utility facilities on freeways and expressways.
3. A facility that is approved for occupancy on the Interstate Highway System must conform to criteria for air rights usage as promulgated by the FHWA.
4. Non-highway uses of right-of-way, including modification of access control, see 23 **CFR** 771.117(d)(7), on the Interstate Highway System must be approved by the FHWA.
5. The Director of MDT may establish additional rules and criteria to protect public safety and the integrity of the right-of-way for transportation use.

All encroachments on a full-access control highway that are not approved pursuant to the above criteria are considered Class D Encroachments. The process for their identification and removal are identified in Sections 7-2.3 and 7-3.

7-2.2 Locked Gate Policy

It is MDT general policy to minimize the presence and use of locked gates on controlled access highways. Locked gates may be approved only for infrequent use and if they are determined to be the only feasible means for servicing utilities and performing highway maintenance or other approved noncommercial purposes. All unauthorized gates, or gates for which a permit has lapsed or been revoked, are considered encroachments.

MDT policy on locked gates is discussed in Chapter 8 of the ***Right-of-Way Operations Manual***.

7-2.3 Identification and Classification of Encroachments

Encroachments are identified on controlled access and non-controlled access highways at the time that MDT initiates a construction or maintenance project on existing right-of-way. The District Construction Section performs a field review and inventory, see Section 7-1.5. The Inventory of Encroachments (Form RWE-2) and the Individual Encroachment Summary Reports (Form RWE-1) are submitted to the property manager.

Encroachments also may be identified individually in the course of ongoing maintenance activities. In this circumstance, the District Maintenance Section submits an Individual Encroachment Summary Report to the Real Estate Services Section Property Manager. The property manager reviews the Inventory of Encroachments and the Individual Encroachment Summary Reports and submits them with comments to the Preconstruction Bureau, requesting review and determination as to the following:

1. Recommended classification of each encroachment; see Section 7-1.4. Any encroachment on controlled access right-of-way that does not meet criteria in Section 7-2.1 is considered a Class D Encroachment.
2. Adjustments that may be made to individual facilities that would correct unacceptable conditions and allow the encroachment to be placed under approved airspace use (Class B) or under conditional agreement (Class C).
3. Determination, for Class D Encroachments, whether immediate removal without notice is necessary to protect public safety or if removal pursuant to owner notification is appropriate. Note that the District may perform immediate removal of an encroachment if the District Administrator determines that it is necessary to protect the public safety and welfare.

The Preconstruction Bureau sends its report and recommendations to the property manager.

7-3 PROJECT ENCROACHMENT CONTROL PROCESS

7-3.1 General

The resolution of encroachments requires the coordinated efforts of the Helena Office Real Estate Services Section and the District Office Right-of-Way Section. This Section describes activities and responsibilities to resolve encroachments that have been identified and classified, as discussed in Section 7-2, on MDT projects.

After completion of project encroachment control activities, jurisdiction for encroachments transfers to the Maintenance Division. That Division handles ongoing surveillance and compliance on the section of highway included in the initial Inventory of Encroachments. Upon transfer of jurisdiction, the Right-of-Way Bureau also transfers all encroachment records and files to the Maintenance Division.

After transfer of jurisdiction to the Maintenance Division, the Right-of-Way Bureau, Preconstruction Bureau, Construction Bureau and Legal Services remain available to provide advice to the Maintenance Division on a case-by-case basis, as requested.

7-3.2 Process Steps — Property Manager

The property manager reviews the Inventory of Encroachments, the right-of-way and/or construction plans, and the report and determinations made by the Preconstruction Bureau.

On the basis of this information, MDT criteria and applicable local regulations, the property manager determines an action to resolve each encroachment.

Encroachments that may be legitimized under the MDT's air space use policy are considered under this procedure. MDT consults with the owner of the facility on the right-of-way to explore the range of options available.

The property manager reviews local ordinances, regulations and agreements that pertain to continuing occupancy under Municipal Exception (Class A) Encroachments. The property manager consults with officials of municipalities or other local governments with regard to encroachments within their boundaries. Local government must concur that an occupancy meets the Class A criteria. If the occupancy on the right-of-way is ambiguously defined or changes seasonally, MDT requires the owner to execute a compliance agreement that defines the limit of the activity meeting the municipal exception criteria.

If an encroachment, with adjustment as determined by the Preconstruction Bureau, will not conflict with maintenance, traffic and safety criteria, the property manager develops an adjustment plan and a conditional agreement for presentation to the owner.

Class D Encroachments are identified either for immediate removal without service of notice or for issuance of an Order to Remove with service of notice.

The property manager submits the following information to the District Right-of-Way Section on completion of the review discussed above:

- a copy of the Inventory of Encroachments indicating the action to be taken on each encroaching facility, and
- 1 set of right-of-way or construction plans.

7-3.3 Process Steps — District Right-of-Way Section

On receipt of the information transmitted by the property manager, the District Right-of-Way Section takes appropriate action to resolve the status of encroachments in conformity with the process outlined below:

1. The District Right-of-Way Supervisor appoints a right-of-way agent to conduct fieldwork and carry out the actions defined in the Inventory of Encroachments that will either remove encroachments or bring them into compliance with this policy. The appointment is in writing and specifies an estimated completion date. A copy is transmitted to the Right-of-Way Bureau Real Estate Services Section.
2. The assigned right-of-way agent investigates to determine the name, address and telephone number of the owner of each encroaching facility.
3. The agent contacts the owners by certified mail with return receipt requested. Each owner also is contacted personally if it is feasible to do so.
4. The District advises each owner of the presence and status of the encroaching facility. The District gives this notice by a Notice to Remove Letter (Form RWE-?) signed by the Right-of-Way Section Supervisor, and also in person if practical. The letter includes information about the required action with regard to the encroachment. The owner is asked to sign and return a copy of the letter indicating its receipt and confirming the action that will be taken to resolve the encroachment. The content of the letter will conform to one of the following options:

- a. With regard to Class A Encroachments, the letter advises the owner of the limitations or conditions that apply to the specific facility to remain in compliance with State and local criteria for continued occupancy.
- b. Owners of Class B Encroachments are provided a copy of the MDT Airspace Use Policy and application (Form RWE-20E). They are notified of any adjustment necessary to qualify for use of right-of-way airspace, including payment of a use and occupancy fee. Alternatively, the owner must remove the encroachment by a specified date.
- c. With regard to Class C Encroachments, the letter advises the owner that as an alternative to removal, certain adjustments may be performed to qualify for continued occupancy under conditional agreement. The term of a conditional agreement cannot exceed 10 years for buildings or 5 years for fuel pumps.

The owner granted conditional agreement after performing adjustments signs a recordable instrument (Form RWE-7c) acknowledging the encroachment and agreeing to remove the facility and restore the site upon appropriate notice. MDT requires a performance bond of sufficient amount, at least \$10,000, to guarantee removal and site restoration, including remediation of hazardous conditions. In addition, the owner furnishes a contractor insurance policy with limits of at least \$250,000/\$500,000 public liability and \$25,000 property damage. This policy must save the traveling public, MDT and its employees and agents harmless from any loss or damage.

- d. Owners of Class D Encroachments are advised that the encroachment must be removed within a period of 30 days. If it is not removed by the owner, MDT will remove it under contract or with State forces and charge the owner.
5. If the owner of an encroachment of any Class objects to a 30-day removal order on the basis of unreasonable hardship, the Right-of-Way Bureau Chief may grant a time extension on recommendation of the Right-of-Way Section Supervisor. The following conditions are considered in granting an extension:
- a. The person acknowledges ownership and the fact of encroachment on a State right-of-way.
 - b. The time extension will not affect public safety or impede traffic or maintenance operations.

- c. There is a degree of hardship that would be caused by immediate removal, including special circumstances relating to age or financial means.
- d. Decision must be made with consistency and equity in regard to other encroachments with similar circumstances on the project.
The term of extension may be in the range of 30 days to 6 months, depending on the size of the encroachment, whether the encroaching facility or device is critical to the use or safe access to an occupied residence, the expense of removal, and equity in comparison with time extensions granted to others on the same project.

If an extension is granted, the District Right-of-Way Supervisor completes the original and 2 copies of the "application" portion of the Application and Agreement (Form RWE-3) and presents it to the owner to sign. The agent fully explains the conditions of application and agreement to the owner before requesting his or her signature.

- 6. The District Right-of-Way Section makes follow-up inspections or contacts as necessary to confirm whether the encroachment is adjusted or removed as agreed. If the encroachment remains unresolved after reasonable efforts and contacts with the owner, the District refers the file for legal assistance through the Right-of-Way Bureau as described in Section 7-3.4.
- 7. If the encroachment is abandoned or the owner refuses or is not able to remove it, MDT may remove it under a contract or with State forces and charge the encroacher, if known. The file is referred to Legal Services through the Right-of-Way Bureau for collection.
- 8. An encroachment that is determined to be a hazard to public safety, or that impedes the safe and effective flow of traffic, is removed by the most expeditious manner available. Prior notice to the owner or person causing the encroachment is not required.

7-3.4 Request for Legal Assistance

Each District Right-of-Way Section requests assistance of Legal Services, through the Right-of-Way Bureau, to resolve the following situations:

- 1. The owner or other person responsible for a major encroachment cannot be determined, or ownership is disputed by the parties involved.

2. Payment for the cost of removing the encroachment is denied by the owner or responsible person.
3. The owner denies the existence of the encroachment on the right-of-way.
When requesting assistance, the District Right-of-Way Section provides Legal Services with full information about the case. This includes reports of all contacts with reputed owners, names, addresses and telephone numbers of all involved persons and all other pertinent information.

7-4 TRANSFER OF JURISDICTION, SURVEILLANCE AND COMPLIANCE

7-4.1 Project Completion

The District Right-of-Way Section Supervisor advises the Right-of-Way Bureau Property Manager by memorandum when every encroachment on a project or highway section is resolved by one or more of the following actions:

- encroachments are removed,
- adjustments of encroachments are agreed by owners,
- Air Space Agreements are executed with owners,
- conditional occupancy agreements are executed,
- time extension for removal is agreed,
- municipal exception status is confirmed, and
- encroachment cases referred for legal action,

On receipt of the project completion memorandum for the District, the property manager reviews the status of all cases and asks for clarification or further action from the District Office if necessary.

7-4.2 Transfer of Jurisdiction

After confirming project completion as above, the property manager prepares a memorandum for signature of the Right-of-Way Bureau Chief to the Maintenance Division Chief. This certifies the status of encroachments on the project and transfers jurisdiction to the Maintenance Division. The certification to the Maintenance Division states either the full resolution of encroachments or the administrative resolution of encroachments. These are as follows:

1. Full Resolution of Encroachments. This status will reflect either the removal of encroachments, the confirmation of municipal exception, or the execution of conditional agreement following completion of adjustments.
2. Administrative Resolution of Encroachments. This status reflects that certain specified encroachments remain on the project that are not resolved as in Item #1. These cases are under administrative control, meaning that there are executed, but not performed, adjustment agreements or time extensions for removal, or the cases were referred for legal action.

If the Right-of-Way Bureau Chief certifies full resolution of encroachments (Item #1.), the jurisdiction for surveillance and control of encroachments transfers completely to the Maintenance Division. If the Right-of-Way Bureau Chief certifies administrative resolution of encroachments (Item #2.), jurisdiction transfers to the Maintenance Division; however, the District Right-of-Way Section remains responsible for resolving and certifying cases that remain outstanding. Further activities of the District to resolve encroachments are reported to the Maintenance Division Chief. The Right-of-Way Bureau provides advice, as requested, to bring encroachments on the project under full control.

In accomplishing a transfer of jurisdiction, the Right-of-Way Bureau provides the Maintenance Division with a list of the status of each encroachment on the project inventory. The list indicates the classification of the encroachment and its resolution status at the time of transfer. The Right-of-Way Bureau transfers the Right-of-Way Bureau encroachment file, including all agreements, determinations, inspection reports, correspondence and removal orders to the Maintenance Division. A copy of the transfer memorandum is provided to the District Office Right-of-Way Section Supervisor and to the Maintenance Supervisor.

7-4.3 Federal Highway Administration Notification

The Right-of-Way Bureau provides a copy of the project completion report and transfer of jurisdiction memorandum to the FHWA for any project on the Interstate Highway System.

7-4.4 Surveillance

The Maintenance Division is responsible for continuing surveillance of the right-of-way for encroachments on State highway right-of-way. The Right-of-Way Bureau is available on a referral basis to resolve individual encroachments that are identified by the Maintenance Division. The process for resolving individual encroachments is the same as described in this Chapter for resolving encroachments on a project basis. The Real Estate Services Section coordinates all requests for Right-of-Way Bureau involvement.

7-4.5 Compliance

The District Right-of-Way Section inspects and confirms the performance of agreed removals and adjustments that are completed after the transfer of jurisdiction to the Maintenance Division. The Maintenance Division monitors compliance on an ongoing

basis. If a violation of an agreement occurs, the Maintenance Division refers the case to Legal Services for enforcement.

7-5 REFERENCES

1. ***Montana Code Annotated***, 60-3-101, *Legislative Assent to Federal-Aid Act*.
2. ***Montana Code Annotated***, 60-6-101, *Highway Encroachments – Removal*.
3. ***Montana Code Annotated***, 60-6-102, *Notice of Encroachment*.
4. ***Montana Code Annotated***, 60-6-103, *Time Limit for Removal*.
5. ***Montana Code Annotated***, 60-6-104, *Denial of Encroachment*.
6. ***Code of Federal Regulations***, 23 **CFR** 1.23(b), *Use for Highway Purposes*.
7. ***Code of Federal Regulations***, 23 **CFR** 1.23(c), *Other Use or Occupancy*.
8. ***Code of Federal Regulations***, 23 **CFR** 771.117(d)(7), *Categorical Exclusions*.